

FOR CALTRANS & LOCAL AGENCY USE
FREQUENTLY ASKED QUESTIONS (FAQS)
DISADVANTAGED BUSINESS ENTERPRISE (DBE)
RACE NEUTRAL PROGRAM

Updated October 11, 2006

Introductory Comments to Readers:

A Ninth Circuit Court of Appeals ruling, on May 9, 2005, in the State of Washington (*Western States Paving Co. vs. Washington State Department of Transportation*), established new evidentiary standards necessary to constitutionally support the use of race-conscious DBE goals on Federal aid contracts. The standards were focused on transportation contracting.

Since California is also under the Ninth Circuit Court of Appeal's jurisdiction and Caltrans also used race conscious DBE goals on Federal aid contracts, the ruling obligated Caltrans to examine the evidence it had to continue a race-conscious DBE program. Absent the evidence, Caltrans would have to amend its program to a race-neutral program.

Beginning December 21, 2005 Caltrans conducted 21 public forums statewide, gathered testimonials, disparity studies and other related evidence as required by the ruling.

Caltrans reviewed the public testimonials, studies and written evidence. Both Caltrans and the Federal Highway Administration (FHWA) concurred that the evidence of discrimination in California in the transportation industry was insufficient to support continued use of race conscious measures (i.e. individual contract DBE participation goals) and did not meet the legal standards established in *Western States Paving Co. Inc v. Washington State Department of Transportation et al.*

Therefore, the information provided in this "Frequently Asked Questions" (FAQ) update, updated October 11, 2006, reflects the California State Department of Transportation's (Department) decision, effective May 1, 2006, to change to a race neutral DBE Program. This decision was jointly arrived at by the Department and the FHWA. The following factors led to the joint conclusion:

1. The data provided did not identify specific evidence of discrimination suffered by any of the presumptively disadvantaged groups identified in 49 CFR Part 26 in the transportation contracting industry in California.
2. The available disparity studies conducted in California were limited in scope to a local government agency or a project, geographically and chronologically

limited, and did not provide “statistical evidence” of discrimination in transportation contracting.

3. The anecdotal evidence related to transportation contracts in California could not be verified.

All affected Departmental Divisions/Offices and Local Agencies were immediately notified on May 1, 2006, of this decision to change to a race neutral program.

Caltrans has awarded a Consultant contract for a DBE Availability and a DBE Disparity Study. This change to an all race neutral DBE Program may be an interim step depending on the results of the disparity study. The study is required to maintain Federal aid funding. The completion of these studies by Caltrans will help determine what percent, if any, of California’s overall statewide DBE goal may be obtained by the use of race conscious measures, such as individual DBE contract participation goals. The Department plans to have these studies completed within twelve months after contract execution.

The Department understands that this possible interim change to a race neutral DBE program affects not only Caltrans, as the State’s primary recipient of Federal aid funding, but also all of the Department’s subrecipients, the Local Agencies who receive Federal aid funding from FHWA and FTA, through Caltrans.

As the decision to change to a race neutral DBE Program was made by the Department, effective May 1, 2006, the following FAQs provide a more detailed history of why the decision had to be made, as well as answering more specific questions about the differences in policy, procedures and administration between a race conscious DBE Program and a race neutral DBE program

1. Q: *What is a Race Neutral DBE Program?*

A: Pursuant to 49 Code of Federal Regulations (CFR) Part 26.5, a *race neutral* measure or program is one that is used to assist all small businesses. Race neutral measures focus on developing the business practices of all small businesses.

2. Q: *“If recipients will be operating an all-race neutral DBE program in FY 2006 or subsequent years, what should such a program include?”*

(Readers please note - this question and answer was reviewed and approved by the General Counsel of the United States Department of Transportation as being consistent with the language and intent of 49 CFR Part 26, and as such is being directly quoted. The word “Department” in this answer therefore refers to the United States Department of Transportation)

- A. “With few exceptions, generally there is no difference in how the DBE

program regulations apply to a race-and gender-neutral program (hereafter race-neutral) as compared to a race-and gender-conscious program (hereafter race-conscious).

In a wholly race-neutral program (e.g., the annual overall DBE goal has been approved with no portion of it projected to be attained by using race-and gender-conscious means) the recipient does not establish individual contract goals for DBE participation on any of its US DOT-assisted contracts as part of its efforts to meet its statewide DBE participation goal.

Recipients should take affirmative steps to use as many of the race-neutral means of achieving DBE participation identified at 49 CFR 26.51(b) as possible to meet the overall goal and to demonstrate that you are administering your program in good faith. The Department expects that recipients using all race-neutral programs will use methods such as unbundling of contracts, technical assistance, capital and bonding assistance, business development programs, etc., rather than waiting passively for DBEs to participate.

The good faith efforts requirements in 49 CFR 26.53 that apply to the use of race-conscious measures (i.e., individual contract DBE participation goals) do not apply when a recipient is implementing a race-neutral program. However, recipients must continue to collect the data required to be reported in the Uniform Report of DBE Awards or Commitments and Payments Form (see §26.11) and to monitor compliance with the commercially useful function requirements.

The prompt payment and retainage requirements of 49 CFR 26.29 are race-neutral mechanisms designed to benefit all subcontractors, DBEs and non-DBEs alike. Recipients using all race-neutral programs must continue to implement them.

The requirement that DBEs must perform a commercially useful function to receive credit toward the overall goal applies to race neutral programs just as it does to programs that use race-conscious means to meet program objectives.

It is helpful for recipients to maintain an effective monitoring and enforcement program to track DBE participation obtained through race neutral means that the recipient claims credit (see 49 CFR 26.37 (b)).”

3. Q: *What obligated Caltrans to adopt the use of solely “race neutral” measures on federally funded contracts?*

A: A Ninth Circuit Court of Appeals decision involving the

Washington State Department of Transportation (WSDOT) held that WSDOT lacked sufficient evidence to support the use of race conscious measures on Federal-aid contracts.

It is important to note that the federally mandated DBE Program itself was not declared unconstitutional.

The Ninth Circuit Court of Appeals' decision is controlling authority for California and other Western States within its jurisdiction.

After an assessment by the Department of its DBE program, the Department established, effective May 1, 2006, that its race conscious DBE program did not meet the new evidentiary standards established by the Ninth Circuit Court of Appeals.

4. Q: *What guidance has the U.S. Department of Transportation's Federal Highway Administration (FHWA) provided to the western states impacted by this court decision?*

A: By letter dated December 21, 2005, the Federal Highway Administration issued guidance to recipients in the Ninth Circuit regarding the effect of the Western States Paving decision. The guidance provided that recipients use of race-conscious goals must be predicated upon evidence of discrimination or its effects within the transportation contracting industry.

5. Q: *What steps did Caltrans take to address the guidance issued in the FHWA letter dated December 21, 2005?*

A: In accordance with the FHWA letter and CFR 26, the Department initiated a 45-day public notice comment period on December 21, 2005, to invite maximum public participation and solicit comments regarding the Department's intent to consider the modification of the DBE program.

The 45-day public comment period ended on February 3, 2006. However, to allow more time for the submission of evidence and information, the Department extended the public comment period to March 20, 2006.

6. Q: *What actions did Caltrans take at the end of the public comment period?*

A: After consideration of all the comments and evidence received by March 20, 2006, effective May 1, 2006, the Department determined, with FHWA concurrence, that it did not have sufficient evidence to permit continuation of any level of a race conscious DBE program and the state would seek to attain its statewide DBE participation goal solely by use of race-neutral measures. The Department is also undertaking a disparity

study. These steps are required to maintain eligibility for Federal aid funding.

7. Q: *What are the main differences between a Race Neutral and a Race Conscious DBE program?*

A: Federal regulations require that a recipient of federal highway and transit funds implement an approved DBE program that consists of establishing a statewide DBE utilization goal and using race-neutral means to achieve the goal to the maximum extent possible. Where race-neutral measures prove inadequate to achieve the goal, states are required to use race-conscious measures, such as DBE participation goals for individual contracts. Like many State Transportation Agencies (STA), the Department and its sub recipients (local agencies) have employed race-conscious measures consisting of DBE contract participation goals established on individual contracts.

The use of race conscious DBE participation goals on individual contracts meant that where an apparent low bidder failed to meet the goal or to demonstrate “good faith efforts” to do so, its bid was deemed non-responsive and its bid was rejected.

In contrast, under a race neutral DBE program, none of the Department’s Federal Aid contracts will include DBE participation goal. The Department will continue, however to establish an overall Statewide DBE goal and will continue to semi-annually and annually report to the Federal Highway Administration (FHWA) on DBE participation.

8. Q: *Does the change from a race conscious DBE Program to a Race Neutral DBE Program affect existing contracts?*

A: Changing from a race conscious to a race neutral DBE program does not have retroactive application, so contracts executed and approved prior to the effective date of May 1, 2006, with race conscious DBE contract participation goals are not affected by the new race neutral DBE program. In terms of contract monitoring, those prime contractors or prime consultants that were awarded contracts with race conscious DBE participation goals would still be required to meet those goals during performance of the contract. The request for DBE substitution process would also remain for the term of those contracts.

9. Q: *What types of contracts does the new race neutral DBE Program apply to?*

A: The race neutral DBE Program applies to any contract awarded

by the Department and Local Agencies with federal funding. These are commonly known throughout the Department as Federal aid projects or contracts or US DOT assisted projects or contracts.

It is important to note that the race neutral DBE program has absolutely no impact on wholly state-funded contracts awarded by the Department, nor does it impact other State of California legislatively enacted preference programs like the Small Business Preference, the Recycled Paper Preference, the Target Area Contract Preference Act, etc. It also does not affect wholly State funded contracts with Disabled Veteran Business Enterprise (DVBE) contract participation goals.

The race neutral DBE Program also has no impact on any wholly local agency funded contracts awarded by the Department or local agencies.

10. Q: *Is there be a penalty for not subcontracting with a DBE under the “race neutral” program?*

A: There is no penalty.

11. Q: *What provisions are in place to monitor/oversee/track the usage of DBE’s?*

A: The adoption of a race neutral DBE Program does not relieve contractors from reporting DBE utilization.

12. Q: *Where can I obtain more information on DBE race neutral measures ?*

A: U.S. Department of Transportation, 49 Code of Federal Regulations (CFR), Part 26, and the FHWA guidance dated December 21, 2005.

13. Q: *Are “Good Faith Efforts (GFE)” Requirements still applicable under a DBE Program using race neutral measures?.*

A: Under the DBE “race neutral” program, the GFE process is not used.

14. Q: *What divisions/programs in the Department are affected directly by the change to a DBE race neutral program?*

A. Any division/program that receives Federal aid or US DOT assisted funding for projects and/or processes Federal aid or US DOT assisted funding for contracts or projects is affected by the change to a race neutral program.

15. Q: *Do we still need to report DBE commitments and Final Utilization under the new DBE race neutral program?*

A. Yes. The DBE race neutral measures do not change federal requirements to report DBE commitments at contract award and DBE final utilization at contract completion.

16. Q: *When did the Department begin to award Federal aid contracts with DBE race neutral measures?*

A: The effective date of the race neutral DBE Program was May 1, 2006

17. Q: *Can Local Agencies continue with their existing DBE Program/Annual Goal?*

A: Effective May 1, 2006, Local Agencies can not continue with their existing DBE Program/Annual Goal, but must adopt the Department's.

18. Q: *Why didn't local agencies have a grace period to implement a race neutral program?*

A. When awarding Federal-aid contracts, local agencies must conform to federal requirements. Caltrans, the state's primary recipient of Federal-aid transportation funding, has determined that at this time there is insufficient evidence to permit the continued use of race conscious measures (i.e. DBE contract participation goals) and has suspended use of such measures. Local agencies are bound by that determination and now that it has been made, there can be no "grace period" for either Caltrans or local agencies.

19. Q: *What actions are needed by Local Agency's board/council for approval of what?*

A: This decision is to be determined by each Local Agency.

20. Q: *If a local agency currently has only a race neutral DBE goal do they have to do anything different since Caltrans has changed to a race neutral DBE program?*

A. Yes, as local agencies no longer have their own DBE Program, but are included in and follow the Department's DBE Program. The Department will submit an annual overall statewide DBE goal and program for the State of California to FHWA for approval.